For Opinion See 2007 WL 6847408 , 2007 WL 1438763 , 2007 WL 841019 , 2006 WL 891163 , 338 F.Supp.2d 97

United States District Court, District of Columbia.
SHARON BLACKMON-MALLOY et al., Plaintiffs,
v.
UNITED STATES CAPITOL POLICE BOARD, Defendant.
No. 1:01CV02221 (EGS).
September 3, 2002.

Plaintiffs' Ikard et al. Memorandum in Opposition to Defendant's Motion to Dismiss or Strike the Complaints

Respectfully submitted, Nathaniel D. Johnson, Federal Bar No #Md14729, Nathaniel D. Johnson & Associates, LLC, 1717 K Street Suite 600, Washington, DC 20036, 3475 Leonardtown Road Suite 105, Waldorf, Maryland, 20602, Attorney for Plaintiffs Larry Ikard et al.

COMES NOW Plaintiffs Larry Ikard *et al.*, by undersigned counsel, and files this memorandum in opposition to Defendant's Motion to Dismiss or Strike the Complaints. As set forth more fully in Section I, below, Plaintiffs represent African-American and Hispanic officers of the United States Capitol Police force. These plaintiffs complained of race and sex discrimination in several areas of their employment relationship with the Capitol Police Board (hereinafter “Defendant”). After plaintiffs exhausted the process for administrative remedies pursuant to the Congressional Accountability Act of 1996, , the Plaintiffs then filed a class action suit against Defendant in the United States District Court for the District of Columbia.

Defendant has moved the Court to dismiss Plaintiffs' claims for lack of jurisdiction and failure to state a claim upon which relief may be granted. In its Motion, Defendant contends that Plaintiffs did not exhaust the administrative remedies in a timely fashion, which prevents jurisdiction from being properly asserted in federal district court. Defendant also asserts that Plaintiffs are prohibited from maintaining this case as a class action, due to the limitations set forth in the Congressional Accountability Act. Lastly, Defendant contends that Plaintiffs' complaints fail to provide it with proper notice of the claims being asserted against it.

However, Plaintiffs can demonstrate that they have fully complied with and satisfied the administrative requirements in order to properly assert jurisdiction and bring this matter before the Court. Furthermore, Defendant cannot demonstrate that class actions are not maintainable under the Congressional Accountability Act, nor that the Act's authority extends over the District Court's ability to define and certify class action suit. Moreover, Plaintiffs' Complaint has met the minimal requirements of Fed. R. Civ. P. 8, to give Defendant proper notice of jurisdiction, claims and relief. As such, Defendant's Motion to Dismiss or Strike the Complaints should be DENIED in its entirety.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

In early 2001, the Black Police Officers Association chapter of the United States Capitol Police force became aware that many of its members were experiencing racial and gender discrimination in many areas of employment. Members who performed their job duties exceptionally and achieving high scores during the promotional process were not receiving higher-level positions; instead the positions were given to White officers. These officers were being singled out for disciplinary actions, and subjected to racial slurs and epithets by other officers on a constant basis.

This prompted the Association to take action. In March 2001, 270 individuals as members of the Association, represented by counsel Charles Ware, filed a class compliant of discrimination with the Office of Compliance (the "Office") at the United States Capitol. This Office was established to administer the policies and procedures of the Congressional Accountability Act (the "CAA"), which extended the protections of Title VII, 42 U.S.C. § 2000e et seq., to Congressional employees, such as the Capitol Police officers. The Office rejected the class complaints by the officers, claiming that class actions were not cognizable under the CAA. The Office instructed the officers to submit separate and individual requests for counseling and mediation, otherwise their claims would not be processed.

Between April 1, 2001 and May 30, 2001, each officer submitted a request for counseling and mediation based on the workplace discrimination he or she was experiencing. In their requests, the officers designated Charles Ware as their representative during the administrative process. Therefore, rather than contacting each individual officer, the Office mainly corresponded with Mr. Ware. Rather than meet with each officer during the counseling process, Ware participated in discussions with Office officials on behalf of all his clients. The officers were notified, via their counsel, that the counseling period had ended.

The next step in the administrative process was mediation. The Office informed the officers that it would schedule mediation sessions with the officers, but had concerns about the logistics of scheduling these meetings because of the large number of complaining officers. Scheduling was even more difficult due to the conflicting schedules of the officers with the Office; thus, the Office found it difficult to arrange time for each officer to participate in individualized mediation. The mediation sessions were ultimately set to occur on July 23 and July 25, 2001; however, only eight (8) officers appeared for their scheduled appointments. On July 25, 2001, the Office issued to all officers a "Notice of End of Mediation" letter, indicating that the officers could elect to file a formal complaint of discrimination or a civil action in federal district court.

Therefore, on August 25, 2001, the complaining officers filed a class complaint alleging race and sex discrimination in the United States District for the District of Columbia on behalf of the 270 members who participated in the administrative process at the Office of Compliance. This complaint consisted of fifteen (15) counts of discrimination, and sought both injunctive and monetary relief for the plaintiffs.[FN1] On March 1, 2002, thirty-three (33) of the originally named plaintiffs submitted an Amended Complaint, captioned as *Larry Ikard v. United States Capitol Police Board.* This Amended Complaint reduced Plaintiffs' allegations to ten (10) counts of discrimination against the Capitol Police Board. See *Amended Complaint, captioned Ikard v. United States Capitol Board, Civ. No. 1:01CV02221, filed March 1, 2002 (hereinafter "Ikard I").*[FN2] This Complaint was further amended on March 2002, to name an additional class member and allege a charge of disparate impact regarding the promotional process utilized by Defendant. See *Second Amended Class Action Complaint, captioned Ikard v. United States Capitol Board, Civ. No. 1:01CV02221, filed March 12, 2002 (hereinafter "Ikard II").*

FN1. Specifically, the Counts of the complaint were as follows:

Count One	Race Discrimination
Count Two	Sex/ Gender Discrimination
Count Three	Abusive Discharge
Count Four	Civil Conspiracy
Count Five	Intentional Infliction of Emotional and/or Mental Distress or Anguish
Count Six	Disparate Treatment/Hostile Work Environment

Count Seven	Sexual Harassment
Count Eight	Discrimination in Promotions Based on Race and Color
Count Nine	Discrimination in Promotions Based on Sex
Count Ten	Discrimination in Hiring Based on Race and Color
Count Eleven	Discrimination in Assignments Based on Sex
Count Twelve	Discrimination in Assignments Based on Race and Color
Count Thirteen	Discrimination in Hiring Based on Sex
Count Fourteen	Discrimination in Discipline Based on Race and Color
Count Fifteen	Reprisal and/or Intimidation

FN2. The Counts of the Amended Complaint are as follows:

Count One	Disparate Treatment Based on Race and Color/ Racial Discrimination
Count Two	Disparate Treatment in Promotions Based on Race and Color
Count Three	Disparate Treatment in Hiring and Training Based on Race and Color
Count Four	Disparate Treatment in Work Assignments Based on Race and Color
Count Five	Disparate Treatment in Discipline Based on Race and Color
Count Six	Racial Hostile Work Environment
Count Seven	Sex/Gender Discrimination
Count Eight	Disparate Treatment in Assignment Based on Sex
Count Nine	Retaliation
Count Ten	Intentional Infliction of Emotional Distress

II. *ARGUMENT*

In its Motion to Dismiss, Defendant contends that the Complaints filed in this matter are "inherently inconsistent" in that they fail to establish jurisdiction for this Court and to state a claim upon which relief may be granted. *See Defendant's Motion to Dismiss or Strike Complaints, Blackmon-Malloy v. United States Capitol Police Board, Civ. No. 01:02221, filed July 10, 2002 (hereinafter Def. Memo. at xx).* Defendant asserts that under Fed. R. Civ. P. 12(b)(1), Plaintiffs failed to exhaust the requisite administrative remedies to establish proper jurisdiction for this Court, and furthermore, that the pleading itself does not contain a statement of jurisdiction which sufficiently satisfies Fed. R. Civ. P. 8. Additionally, Defendant contends that Plaintiffs have also failed to state a claim upon which relief may be granted, in that the alleged claims are untimely or not actionable as a matter of law.

As set forth more fully below, however, Plaintiffs have satisfied administrative prerequisites established pursuant to the Congressional Accountability Act, 2. U.S.C. § 1301 *et seq.*, (the "CAA") prior to the instigation of their civil action in this Court. The claims alleged by these individuals set forth allegations of continuing and systemic discriminatory practices by Defendant which represent on-going violations of Plaintiffs' civil rights. The pleading, in its entirety, is actionable and therefore, Defendant's Motion to Dismiss, or to Strike the Pleadings should be DENIED.

A. JURISDICTION IS PROPER IN THIS COURT BECAUSE PLAINTIFFS PROPERLY EXHAUSTED THEIR ADMINISTRATIVE REMEDIES UNDER THE CAA.

In reviewing a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the court must accept the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See, e.g., Pitney Bowes v. United States Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998). The plaintiff bears the burden of persuasion to establish subject-matter jurisdiction by a preponderance of the evidence. *Darden v. United States;* 18 Cl. Ct. 855, 859 (Fed. Cl. 1989). In determining whether the plaintiff has met this burden, the court is sometimes required to look to matters outside of the pleadings. *See In Re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1442 (D.C. Cir. 1989).

In the instant case, Plaintiffs Ikard *et al.* have satisfied the administrative prerequisites of the CAA to establish jurisdiction in this Court. Under the CAA, the Plaintiffs were required to completed the procedures administered by the Office of Compliance, including requests for counseling and mediation. Once these procedures were complete, Plaintiffs properly brought an action before this Court.

1. Plaintiffs Properly Exhausted Their Administrative Remedies under the CAA.

The CAA was enacted in 1996 to extend the rights and protections of eleven workplace laws to employees of the legislative branch of the federal government, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (hereinafter "Title VII"). 2 U.S.C. § 1302(a)(2). Specifically, the Act extended the protections of 42 U.S.C. § 2000e-2, ensuring that an employer cannot discriminate against a covered employee based on race, color, religion, sex, or national origin with respect to his compensation, terms, conditions, or privileges of employment. 2 U.S.C. § 1311(a) (expressly applying the protections set forth in 42 U.S.C. § 2000e-2). The CAA also established the Office of Compliance (the "Office") to administer the procedures and policies governing the filing of complaints of discrimination and the resolution of such disputes. 2. U.S.C. § 1381. Thus, the CAA functions in a similar fashion as Title VII, in that the purpose of both statutes is to provide the exclusive means of resolution for charges by federal sector employees. Moreover, each statute provides the exclusive means by which an aggrieved federal employee can commence a civil action to remedy his charge of employment discrimination. However, a fundamental difference between the two Acts is that the CAA requires employees to complete the administrative remedies process before jurisdiction can be established for civil actions. 2 U.S.C. § 1408 ("A civil action may be commenced by a covered employee only to seek redress for a violation for which the employee has completed counseling and mediation.").

A lenient standard applies in evaluating whether an aggrieved party's actions has met his or her administrative exhaustion responsibilities. *Brodetski v.Duffy*, 199 F.R.D. 14, 18 (D.D.C. 2000); *See, e.g., Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972); *Loe v. Heckler*, 768 F.2d 409, 416-17 (D.C. Cir. 1985); *Bethel v. Jefferson*, 589 F.2d 631, 641-42 (D.C. Cir. 1978). The administrative procedures established under the CAA consist of a three-step process: (1) counseling, (2) mediation and (3) election. An employee first initiates the administrative process by requesting counseling by the Office not later than 180 days after the date of the alleged discriminatory act.[FN3] 2 U.S.C. § 1402(a). Once the request is submitted, a counselor provides the employee with information concerning his rights and responsibilities under the Act and

the Office's procedural rules. Office of Compliance Rule 2.03(e) *(hereinafter "OC Rule xxx")*. The counseling period typically lasts for thirty (30) days. 2 U.S.C. § 1402(b). Once the counseling period has ended, the employee next must request mediation by the Office. 2 U.S.C. § 1405(a). The Office then oversees mediation between the employee and employing office. Each party may have a designated representative during this process.[FN4] The mediation period terminates within thirty (30) days, unless there is consent between the two parties to continue negotiations. OC Rule 2.03(h). The mediation period may terminate without final resolution to the matter which formed the basis for such mediation. OC Rule 2.04(i). The employee then may, not later than 90 days after the receipt of this notice of the end of mediation, but no sooner than 30 days after that date, elect either to file a formal complaint for hearing with the Office or file a civil action in the United States District Court for the district in which he is employed or for the District of Columbia. 2 U.S.C. § 1404; OC Rule 2.05(a).

> FN3. The purpose of the counseling period shall be: to discuss the employee's concerns and elicit information regarding the matter(s) which the employee believes constitute a violation(s) of the Act; to advise the employee of his or her rights and responsibilities under the Act and the procedures of the Office under these rules; to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible. OC Rule 2.03(d)

> FN4. Mediation is a process in which employees, employing offices and their representatives, if any, meet separately and/or jointly with a neutral trained to assist them in resolving disputes. As parties to the mediation, employees, employing offices, and their representatives discuss alternatives to continuing their dispute, including the possibility of reaching a voluntary, mutually satisfactory resolution. OC Rule 2.04(a).

Plaintiffs Ikard *et al.* clearly met the minimum statutory requirements under the CAA to establish proper jurisdiction in this Court. The Act expressly states that an employee must request counseling and mediation prior to filing a civil action. 2 U.S.C. §§ 1402, 1405, 1408 (emphasis added). In April and May 2001, each named Plaintiff submitted his or her individual request for counseling and mediation to the Office of Compliance. In its Motion, Defendant alleges that only one of the named Plaintiffs, Jerry Dickson, failed to make a request for counseling. *See Defendant's Motion at Exh. F.*

Because Plaintiffs also requested mediation in their initial submissions to the Office, the second step of the administrative process also was satisfied. Defendant contends that because only eight individuals[FN5] participated in the mediation sessions on June 5 and 27, 2001 that the administrative process was not properly completed. However, the Act requires only that a request for mediation is made. 2 U.S.C. §1404(a) (emphasis added) ("[T]he covered employee who alleged a violation of a law shall file a request for mediation with the Office"). Moreover, because of the sheer number of requests, the Office itself had difficulties in arranging the mediation sessions, and "released" Plaintiffs from participating in the mediation sessions. As such, each Plaintiff received a "Notice of End of Mediation" which expressly granted him or her the right to pursue the discrimination claims by filing a formal complaint with the Office or a civil action in federal district court. Furthermore, although Defendant may have

> FN5. Of the plaintiffs named in Ikard I and II, Frank Adams and Earl Allen Jr. were present for mediation sessions on July 23, 2001. expressed its willingness to continue mediation, Plaintiffs were entitled to refuse to agree to an extension of the process. See 2 U.S.C § 1403(c) ("The mediation period may be extended for additional periods at the joint request of the covered employee and the employing office.") (emphasis added).

To the extent that Defendant may argue that the Office may have exceeded its authority by issuing the Notice of End of Mediation to Plaintiffs without each individual participating in a mediation session, Plaintiffs should not be penalized for the Office's error. Under Title VII, a Plaintiff is not penalized for the administrative errors of the Equal Employment Op-

portunity Commission ("EEOC"). *See Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 81 (7th Cir. 1992) ("Misleading conduct by the EEOC can be a basis for toiling the administrative statute of limitations"); *Brezovski v. United States Postal Service*, 905 334, 335 (1990) (Court ruled that language in the right to sue letter was sufficiently misleading to justify tolling the statute of limitations period for the plaintiff). Accordingly, here Plaintiffs acted in good-faith under the direction of the Office of Compliance, and thus did not question the Office's blanket "release" from the mediation requirement.

2. Plaintiffs' Requests were Timely Under the CAA's Filing Requirements.

Defendant also contends that the claims of some named Plaintiffs are untimely; as such, Plaintiffs have failed to comply with the administrative process and, therefore, jurisdiction is improper. Timeliness in the exhaustion of the administrative remedies process is a jurisdictional requirement under the CAA. *Halcomb v. Office of the Senate Sergeant at Arms*, 2002 U.S. Dist. LEXIS 11804 at *10 (D.D.C. June 4, 2002) ("This Court finds that the language of the CAA requires completion of counseling and mediation as jurisdictional prerequisites to filing a lawsuit.") Nevertheless, the requirements of the CAA may be equitably tolled, similarly to Title VII:

The Supreme Court has held that the filing of a timely charge of discrimination is not a jurisdictional prerequisite to a Title VII action. Rather, it is a requirement that is subject to waiver, estoppel, and equitable tolling. *See Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 393, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982). In *Zipes*, the Supreme Court noted that the portion of Title VII specifying the time for filing charges appears in a separate provision from the portion granting jurisdiction for actions brought under it. Furthermore, the Court observed that the section regarding the timely filing of claims does not speak in jurisdictional terms or refer in any other way to the jurisdiction of the district courts... Similarly, the CAA provision that specifies a time for filing charges appears in a separate section from the one covering jurisdiction, and does not make any mention of jurisdiction. See 2 U.S.C. § 1402(a), 2 U.S.C. § 1408(a).

Thompson v. Capitol Police Bd., 120 F. Supp.2d 78, 79 (D.D.C. 2000). *See also, Halcomb*, 2002 U.S. Dist. LEXIS 11804 at **8-9.

The doctrine of equitable estoppel "prevents a defendant from asserting untimeliness where the defendant has taken active steps to prevent the plaintiff from litigating in time," and the principle of equitable tolling "allows a plaintiff to avoid the bar of the limitations period if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Jarmon v. Powell*, 208 F. Supp. 2d 21 (D.D.C. 2002) (citing *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1999)). This Court typically exercises the equitable tolling doctrine only in "extraordinary and carefully circumscribed instances." *See Mondy v. Secretary of the Army*, 269 U.S. App. D.C. 306, 845 F.2d 1051, 1057 (D.C. Cir. 1988). In *Jarmon*, the Court refused to extend the plaintiff equitable relief from the administrative filing requirements for his Title VII complaint of discrimination. Though the plaintiff had complained to the appropriate officials during the proscribed filing period, he had not specifically made allegations of racial discrimination. Therefore, he failed to put the agency on notice that he was asserting an equal employment opportunity violation. *Id.* at 2002 LEXIS 11879 (D.D.C. July 2, 2002). Moreover, the plaintiff delayed eighteen months before he filed an actual charge of discrimination. *Id.* at *20.

In the present case, Plaintiffs' actions did provide Defendant adequate notice of their discrimination claims. In March 2001, within the statutory 180-day limitation period, the Plaintiffs, along with other members of the Capitol Chapter Black Police Association presented to the Office of Compliance a class complaint of discrimination and unfair treatment. The Office refused to accept this submission, stating that the class Complaint was not cognizable under the CAA. However, the CAA does not expressly prohibit class action complaints during the administrative process; indeed, the Act generally states laws of Title VII are made applicable to the legislative branch of the federal government. 2 U.S.C. §

1301(a). As such, Plaintiffs were not provided proper notice that the class complaint would be deemed deficient. Additionally, the class Complaint provided the Office sufficient notice of Plaintiffs' allegations of race and sex discrimination against the Capitol Police Board. Thus, while each Plaintiff diligently worked to submit his or his individual request for counseling, the Office had already been made aware of the substance of these complaints.

Furthermore, in light of the Supreme Court's ruling in *National Railway Passenger Corp. v. Morgan,* 122 S. Ct. 2061 (2002), Plaintiffs' allegations are timely as claims of hostile work environment. In *Morgan,* the Supreme Court ruled that a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate time period, rather than asserting a "continuing violation" claim. The Court further ruled that a hostile work environment claim may extend outside of the proscribed filing period: "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *Id.* at 2073. Here, Plaintiffs' allegations contend that Defendant has consistently and persistently treated Black, Hispanic and female officers disparately in terms of work assignments, training, discipline, hiring and promotional opportunities, and that this unfair treatment has been on-going for several years. These wrongs constitute a hostile work environment claim. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. *Id.* at 2074. A charge alleging a hostile work environment claim .. ... will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. *Id.* at 2077. Thus, Plaintiffs' claims were timely since the allegations assert an on-going racial and sex-based animus and set forth continuing discriminatory practices.

3. The Court May Reasonably Infer that the Claims Asserted within Plaintiffs' Complaints Were Those Raised During the Administrative Process.

Defendant further state that the Court cannot assert jurisdiction over Plaintiffs' claims because the Plaintiffs have not alleged that "the subject of their complaints was in fact the subject of their request for counseling." *See Def. Memo. at 16.* Defendant, however, does not point to a single allegation which was not raised during the administrative process. Here, it seems, Defendant is struggling to circumvent the confidentiality policy of the Office of Compliance. See 2 U.S.C. § 1416 (All counseling and mediation shall be strictly confidential, except that the Office and the employee may agree to notify the employing agency of the allegations.). Defendant, therefore, was unable to retrieve details of Plaintiffs' allegations of discrimination submitted to the Office.[FN6] See *Def. Memo. At 17, Exh. H.* Nevertheless, the Office's enforcement of this policy should not assign a heavier burden to the Plaintiffs in pleading their claims before this Court.

> FN6. Gary Green, the General Counsel of the Office of Compliance, informed Defendant that "these materials are already in possession of one or more of the parties." *Def. Memo. at Exh. H.* Furthermore, he asserts that the documents are protected attorney-client privilege and the attorney work-product doctrine. *Id.*

Moreover, Defendant has attained some knowledge of what allegations were raised during the administrative process in that it has presented a list of "Individuals for Whom No Specific Allegations are Known." See *Def. Memo. at Exh. E.* No Plaintiff named in *Ikard I* and *II* is found on this list. Viewing these circumstances in the light most favorable to the Plaintiffs, the Court can reasonably infer that Defendant has been properly noticed regarding the allegations presented in Plaintiffs' amended complaints. Therefore, Defendant's assertion here represents nothing more than an attempt to retrieve information and/or documentation prior to a formal request to Plaintiffs' by official discovery means.

4. The Court Can Hear Plaintiffs' Claims as a Class Action Regardless of the Administrative Constraints of the CAA.

Lastly, Defendant extends the scope of authority of the CAA in asserting that the Plaintiffs here may not litigate their claims as a class action in federal district court. In support of this contention, Defendant notes that Title VII regulations

permit the filing of a class action at the administrative level, whereas the CAA requires that each individual employee requests counseling and mediation. See *Def. Memo. at 9.* Defendant further relies on the statements of William Thompson, Executive Director of the Office of Compliance, regarding the authority of the CAA. *Id.; Def. Memo. at Exh. A.* Mr. Thompson refers to 2 U.S.C. § 1361 to assert that only an employee who "has undertaken and completed the procedures of sections 402 and 403 [counseling and mediation] may be granted a remedy." *Def. Memo. at Exh. A.* Defendant also asserts that in a prior case, resolved by a settlement agreement, the Office of Compliance asserted that a class action could not be maintained under the CAA. Nevertheless, this issue has never been adjudicated by any court.

Defendant does not present any legal authority to demonstrate that the CAA is controlling over the form of a civil action which can be maintained in federal district court. A class action is a device established and governed by Fed. R. Civ. P. 23. Its purpose is to save "the resources of both the courts and parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion..." *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979); *Cook v. Boorstin,* 763 F.2d 1462 (D.C. Cir. 1985). Thus, the Court, rather than the statute governing the administrative processing of a discrimination complaint, determines whether claims should be litigated individually, or by joinder or a class action.

Defendant's comparison of Title VII and the CAA on this issue also fails to support its contentions here. While some jurisdictions have ruled that, in a federal sector employment discrimination suit, a plaintiff must allege class allegations at the administrative level prior to filing a class action in a judicial forum. This Court has maintained that, provided that the named plaintiff has exhausted his individual administrative remedies under Title VII, he may assert class allegations in his civil action. *See Hartman v. Wick,* 678 F.Supp. 312, 336-337 (D.D.C. 1988); *Barrett v. United States Civil Service Comm.,* 69 F.R.D. 544, 553 (D.D.C. 1975). Thus, while a class action may be asserted at the administrative level, it is not a mandatory prerequisite. Therefore, because each of these named Plaintiffs have properly exhausted his or her individual administrative remedies, each is eligible to be considered as a class representative or agent.

B. PLAINTIFFS HAVE STATED CLAIMS FOR WHICH RELIEF MAY BE GRANTED.

A complaint should not be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6) unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of her claim which entitle her to relief. *Albright v. Oliver,* 510 U.S. 266, 268, 114 S. Ct. 807 (1994); *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957); *Campbell v. Nat'l Railroad Passenger Corp.,* 163 F. Supp. 2d 19, 21 (D.D.C. 2001). The Court must accept all well-pleaded allegations and should review the complaint in the light most favorable to the plaintiff. *Kowal v. MCI Communications Corp.,* 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994). To prevail, the defendant must show "beyond doubt that the plaintiff[s] can prove no set of facts in support of [plaintiffs'] claim which would entitle [them] to relief." *Conley,* 355 U.S. at 45-46; *Campbell,163* F. Supp.2d at 22; *Sparrow v. United Airlines,* 216 F.3d 1111 (D.C. Cir. 2000). To survive a motion to dismiss for failure to state a claim, a plaintiff need not plead facts beyond those which would " 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Swierkiewicz v. Sorema,* 534 U.S. 506, 122 S. Ct. 992, 998 (quoting *Conley* 335 U.S. at 47). Fed. R. Civ. P. 8(a)(2) requires only that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief."

In the present case, Defendant contends that the allegations set forth in Plaintiffs' complaints fail to provide sufficient specificity to place Defendant on notice of the claims being asserted against it. However, Plaintiffs have provided adequate information to set forth the "short and plain statement of the case" required under Rule 8 to notify Defendant of the claims being asserted.

1. Plaintiffs Have Properly Asserted a Claim of Disparate Impact Racial Discrimination Regarding Defendant's Promo-

tional Process.[FN7]

FN7. In *Ikard II*, Plaintiffs asserted a claim of disparate impact racial discrimination in Defendant's promotional process. As such, this section will discuss the particulars of that claim.

Defendant first contends that Plaintiffs' claim of discriminatory disparate impact of Defendant's promotional process is not sufficiently pled, in that (1) the statistical analysis provided is inaccurate and (2) the allegations fail to state the "particular or specific" element of the process which has created the discriminatory impact. *See Def. Memo. at 19-21.* Plaintiffs, however, assert that the averments set forth in Count Eleven of the Amended Complaint were sufficient to put Defendant on notice of this claim.

The D.C. Circuit has not held specifically that there needs to be a certain amount of statistical evidence present when bringing forth a class action for racial or other discriminatory forms under Title VII. In *Metrocare v. Washington Area Transit Authority*, 679 F.2d 922, 929-31 (D.C. Cir. 1982), the court explained that statistical evidence does help a class action survive because it helps to prove the discriminatory intent of the employer. The court also explained that if statistics are used they should be accurate and useful in proving the claims being asserted. *Id.* The court has apparently followed the rule that statistics are not needed to demonstrate a *prima facie* class action claim under Title VII, but. when they are used they can have great weight. *See for e.g.*, Palmer v. Shultz, 815 F.2d 84, 98 (D.C. Cir. 1987) (cited in *Brown v. Brody*, 199 F.3d 446, 454 (D.C. Cir. 1999)) ("When plaintiffs in a Title VII case introduce statistical evidence of an extreme disparity in the selection rates for men and women for a certain type of job, the fact that these Plaintiffs have insufficient evidence to establish an inference of discrimination regarding other employment decisions should not block an inference of discrimination on the specific type of employment decision at issue.")

Therefore, Defendant here has prematurely argued the merits of Plaintiffs' statistics. In the complaint, the averments generally set forth that there is a disparity between minority group officers (Black and Hispanic) and White officers with regard to Defendant's promotional process. In their allegations, Plaintiffs indicate that despite the fact that all officers undergo the same process, "African-Americans and Hispanics have been severely underrepresented in the promotion process during these past several years." *Ikard II at 4.* Moreover, this process is comprised of numerous objective and subjective factors in that it requires standardized testing, personal interviews of candidates and performance ratings by supervisors, such that discovery must be performed so that Plaintiff may present more detailed statistical analysis. Furthermore, given that an individual's final ranking is based on all these factors, Plaintiffs are forced to allege that Defendant's entire promotional practice, rather than one specific component, has a disparate impact on Blacks and Hispanics. As such, Counts Eleven of Plaintiffs' Second Amended Class Complaint set forth proper allegations of disparate impact racial discrimination.

2. The Allegations Regarding Work Assignments and Disciplinary Actions Are Properly Asserted Since These Acts May Demonstrate Adverse Employment Actions.

Defendant next erroneously applies *Brown v. Brody*, 199 F.3d 440 (D.C. Cir. 1999), to assert that plaintiffs cannot set forth claims of discrimination based on work assignments and disciplinary actions since these acts cannot constitute an "adverse employment action." Defendant's application of *Brown* extends too broadly and misconstrues the prevailing definition of "adverse employment action" by this Court.

A recent D.C. Circuit Court decision defined an "adverse employment action" to include "no particular type of personnel action" under Title VII, "as long as the Plaintiff is 'aggrieved' by the action." *Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 2000). In *Cones*, the court rejected the defendant-employer's claim that only employment actions of "some significance," such as hiring, firing, or promotion are actionable under Title VII, citing precedent stating that any adverse action

can be a violation of Title VII. *Id.* (citing *Passer v. American Chemical Society,* 935 F.2d 322, 331 (D.C. Cir. 1991)). *Brown,* as cited by Defendant, did not define an "adverse employment action" but instead held that the plaintiff in that case had not satisfied the requirements under Title VII to prove that a lateral transfer represented an adverse employment action taken against her. Brown,199 F.3d at 460; *see also Stella v. Mineta,* 284 F.3d 135, 142 (D.C.Cir. 2002) (D.C. Circuit noting its affirmance that plaintiff had failed to demonstrate her lateral transfer rose to the level of an adverse employment action). Thus, the Court held only that the plaintiff did not prove that her denial for transfer was based on improper racial motives. Indeed, in analyzing whether such transfers are adverse actions, "... it is not enough to ask whether the transfer was purely lateral. We must also ask if other changes in terms, conditions, or privileges followed from the transfer." *Freedman v. MCI Telecommunications Corp.,* 255 F.3d 840, 841 (D.C. Cir. 2001). To summarize, "[w]hile it is true ... that no particular type of personnel action is automatically excluded from serving as the basis for a Title VII claim, .. it is also true that not all personnel actions are sufficient to give rise to a discrimination claim... Title VII plaintiffs must demonstrate that an allegedly adverse personnel action had a tangible impact on the terms and conditions of a plaintiffs employment." *Mack v. Strauss,* 134 F. Supp. 2d 103, 112 (D.D.C. 2001) (internal citations omitted).

As such, Defendant's sweeping dismissal of Plaintiffs' claims regarding work assignments and disciplinary actions is not only overbroad but blatantly premature. The allegations in Counts Four and Five of Plaintiffs' complaint state that Defendant's disparate treatment in work assignments has denied Plaintiffs "opportunities to terms and conditions of their employment." *See Ikard I at* ¶ 30. Moreover, Plaintiffs refer not just to written reprimands or admonishments, but to investigations by Internal Affairs. *See Ikard I at ¶ 31.* Viewing these allegations in the light most favorable to Plaintiffs, it can be reasonably inferred that Plaintiffs perceive these actions to be "tangible employment actions." Therefore, Plaintiffs here has alleged sufficiently facts to place Defendant on notice of their claims regarding these employment actions.

3. Plaintiffs Also Properly Asserted Claims of Retaliation Under the CAA.

Count Nine of *Ikard I* sets forth a claim of retaliation concerning Defendant's treatment of Plaintiffs who raised complaints or allegations of workplace discrimination. Defendant now asserts that this claim should be dismissed because of a failure to exhaust administrative remedies. Yet again, Defendant misconstrues the law here, in that this claim of retaliation includes protected activity taken prior to the administrative process.

Under Title VII case law, retaliation occurs when an employer acts adversely toward an employee after that employee has made assertions or complaints of discrimination; a Plaintiff is not even required to prove that the conduct opposed was in fact a violation of Title VII. *Goos v. Nat'l Ass'n of Realtors,* 715 F. Supp. 2, 3 (D.D.C. 1989). "Courts have not imposed a rigorous requirement of specificity in determining whether an act constitutes 'opposition' for purposes of [the opposition clause]." *E.E.O.C. v. Crown Zellerbach Corp.,* 720 F.2d 1008, 1013 (9th Cir. 1983). Protected activity need not take the form of a lawsuit or of a formal complaint to an enforcement agency sucn as the EEOC or the OHR. On the contrary, internal complaints have been held to constitute "clearly protected activity." *Coos,* 715 F. Supp. at 4; *Carter-Obayawana V. Howard University,* 764 A.2d 779, (D.C. App. 2001).

In this case, Plaintiffs have correctly pled that actions taken against them both prior to and after their submissions to the Office of Compliance constituted retaliation in violation of Title VII and the CAA. To the extent that the actions were taken prior to the administrative process, the allegations of retaliation represents alternate claims, since such actions are also pled in other counts. *See Ikard I at* ¶¶ 51-54. To the extent that the reprisal took place during or after the administrative process, the allegations are cognizable because they are "like or reasonably related to the allegations of the [administrative] charge and grow out of such allegations.' " *Mack,* 134 F. Supp. 2d at 109 (citing *Cheek v. Western & Southern Life Ins. Cc.,* 31 F.3d 497, 500 (7th Cir. 1994)). This requirement is satisfied if (1) there is a reasonable rela-

tionship between the allegations in the administrative charge and the civil complaint; and (2) the civil allegations in the charge. *Id* Therefore, Defendant's assertion that additional requests for counseling must be filed prior to the litigation of a retaliation claim is clearly erroneous.

4. Plaintiffs May Also Assert Claims of Gender Discrimination in the Initial Complaint.

Lastly, Defendant attempts to dismiss the gender discrimination claims asserted by Plaintiff, contending that these claims "do not lit with those 01 me putative class." *Def. Memo. at 28.* This argument is inappropriate at this time. Since the class has not yet been certified, Plaintiffs are allowed (and perhaps, even required) to plead an claims "arising from or related to the same course of actions." In this instance, there is a potential subclass of members who are asserting gender-based claims, Until aria unless the class is defined and certified in a form, which is adversarial or in conflict to this subclass' allegations, this claim may stand as a separate count of the complaint.

III. CONCLUSION

For the foregoing reasons, Plaintiffs Larry Ikard et al. respectfully request that Defendant's Motion to Dismiss or to Strike the Complaints be DENIED in its entirely. Plaintiffs have satisfied the requirements of Fed. R. Civ. P. 8 in setting forth the complaints of discrimination against the Capitol Police Board.

Plaintiffs' Request an Oral Argument.

Respectfully submitted,

<<signature>>

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SHARON BLACKMON-MALLOY et al., Plaintiffs, v. UNITED STATES CAPITOL POLICE BOARD, Defendant. 2002 WL 34359741 (D.D.C.) (Trial Motion, Memorandum and Affidavit)

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